

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Tulare, Lemoore, Farmersville,
Madera, Fresno/Friant, California)

AMERICAN TRANSIT MIX COMPANY, INC.

Employer

and

Case 32-RC-5168

OPERATING ENGINEERS LOCAL
UNION NO. 3, INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND ORDER DIRECTING ELECTION

On August 7, 2003, I issued a Decision and Order in this matter in which I found, among other things, that the petitioned-for unit, which included certain employees at the Employer's facilities in Tulare, Lemoore, and Farmersville, California, was not an appropriate unit; that a five facility unit including the petitioned-for employees at the Employer's facilities in Tulare, Lemoore, Farmersville, Madera and Fresno/Friant, California would be an appropriate unit; that the Petitioner would have to notify the Region if it was now seeking an election in that five-facility unit; and that if it chose to have an election in the five-facility unit, it must have or promptly present a sufficient showing of interest to warrant holding an election in the expanded unit.

On August 12, 2003, the Region received written notice from the Union that it is seeking an election in the five-facility unit. I have administratively

determined that the Union has a sufficient showing of interest to warrant holding an election in the expanded unit.

On September 8, 2003, I received the Employer's Request for Review of my August 8, 2003 Decision and Order in this case. In its Request for Review, the Employer raised various arguments challenging my finding that the above-described five-facility unit is an appropriate unit. I have decided to treat the Employer's Request for Review as a Motion for Reconsideration. I have considered the evidence and the arguments presented by the parties in the initial phase of this proceeding and the arguments raised by the Employer in its Request for Review. As discussed below, I have concluded that the five-facility unit now sought by the Petitioner is an appropriate unit and I am ordering an election to be held in that unit.

FACTS¹

The Employer is a California corporation engaged in the production, sale and delivery of ready-mix concrete and operates 23 ready-mix facilities in California's Central Valley from the city of Lodi in the North to Taft in the South. In order to produce and deliver its product, the Employer employs several different classifications of employees, including batch plant operators, loader/operator/yardmen, mechanics, maintenance employees, and ready-mix truck drivers.

¹ The Employer argues that the five-facility unit issue was not made apparent or litigated at the hearing and that the record has insufficient facts to decide this issue. I have concluded that there are sufficient facts to decide the issues in this case. I also note that representational cases are non-adversarial hearings and that the Board is not limited to the units proposed by the parties. See Oklahoma Blood Institute, Inc., 265 NLRB 1524 (1982) (Union sought single facility unit and the Employer sought a five facility unit. The Board found that a three-facility unit was appropriate).

The President of the Employer is Jerry Larsen. Reporting directly to Larsen are the Labor Relations Manager, Jim Hamilton, and the Operations Manager, Harry Ambrosini. The other Operations Managers report directly to Ambrosini. The supervision of the employees employed at the Employer's ready-mix facilities is highly centralized, and the evidence indicates that the Employer does not employ supervisors at the batch plants. Instead, regional managers are responsible for the direct supervision of production employees. The Employer uses two different but overlapping regional models. The Employer's administrative grouping for batch plant operators, loader/operator/yard men and ready-mix truck drivers is based on three regions: north, central and south, with a different operations manager assigned to each region. The administrative grouping of the mechanics is based on a northern and a southern region, with each region having a separate supervisor. The maintenance employees are also grouped into a northern and southern region, although, both regions have the same supervisor.

The central region for the batch plant employees includes the Tulare, Lemoore and Farmersville facilities as well as facilities in Madera and Fresno/Friant.² Perfecto "Junior" Barbosa is the Operations Manager for the central region. His primary office is located in Fresno, which is the office for the central region. It appears that the Fresno office is separate from the Employer's Fresno/Friant batch plant facility. The southern region for the mechanics and maintenance employees runs from Madera south to Taft and includes the five

² At the hearing, this facility was referred to as both the Fresno and Friant facility as well as the Fresno/Friant facility. Apparently, the facility is actually located in Friant, which was described as a suburb of Fresno.

petitioned-for facilities, as well as several other facilities. The two maintenance employees, who service each of the facilities in the Employer's southern region, report directly to Operations Manager Harry Ambrosini. Each of the mechanics assigned to facilities in the southern region, including the two mechanics who work almost exclusively at the Tulare, Lemoore and Farmersville facilities, report directly to Elio Alves. Alves has an office at the Tulare facility.³

The Employer has only recently acquired the Tulare, Lemoore and Farmersville facilities, and in each instance, it did so through a lease with California Portland Cement. The Tulare facility was acquired in about September 2002, the Lemoore facility in about January 2003, and the Farmersville facility in about April 2003. Prior to the Employer's lease of these facilities from California Portland Cement, each of these facilities was owned and operated by Artesia Ready Mix, which apparently lost the facilities through forfeiture.

The parties stipulated that the Employer currently employs one batch plant operator at both the Lemoore and Farmersville facilities and two at the Tulare facility, one of whom is a trainee. It also appears that the Fresno/Friant and Madera facilities each have one batch plant operator. The Employer also employs one loader/operator/yard man at the Farmersville facility and a yardman at Fresno/Friant facility.⁴ The Employer's two mechanics are assigned to the Tulare facility, but also regularly perform work at the Lemoore and Farmersville facilities. The two maintenance employees work out of their homes and perform equipment maintenance at the Employer's 10 southern California region facilities,

³ Elio Alves and his northern counterpart report to Ted Newlon. The record is silent on the titles of these individuals.

⁴ It is unclear whether there is a loader or yardman at the Madera facility.

but the parties agree that they should be considered part of any unit that includes the Tulare facility.⁵ The parties also stipulated that the Tulare plant is about 20 miles from the Farmersville facility and about 35 miles from the Lemoore facility, and that the Lemoore facility is about 35 miles from the Farmersville facility. The Fresno/Friant and Madera facilities are about 50-70 miles from the other petitioned-for facilities.⁶ Delano is the closest facility that is not included in the Employer's central region. Delano is about 37 miles from the Tulare facility and about 44 miles from the Farmersville facility. Delano is about 62 miles from Lemoore and it is about 97 miles from both Fresno/Friant and Madera.

ANALYSIS

Here, the Petitioner seeks to represent certain employees in a multi-facility unit, but does not include employees who are in the same job classifications at several of the Employer's other facilities. In determining whether such a unit is appropriate, the Board considers a number of factors, including the employees' skills and duties; their terms and conditions of employment; employee interchange; the functional integration of the employer's operation; the

⁵ The Employer asserts in its Request for Review that its stipulation to include the maintenance employees does not apply to the five-facility unit. At the hearing, the parties stipulated as to the number of employees in each job classification for which the Petitioner was petitioning in the three-facility unit. The Employer agreed to the stipulation with the clarification that the two maintenance employees worked out of their homes and could work at any of the Employer's ten locations in the Southern San Joaquin Valley. The Union's attorney then stated that it was his understanding that the Employer does not object to the inclusion of the maintenance employees in the unit, and the Employer stated that that was correct. As the Union's question and the Employer's agreement that the maintenance employees should be included in the unit was not expressly limited to the three facility, and the expanded unit includes only a few additional employees, none of whom were maintenance employees, I have concluded that the Employer's agreement to the inclusion of the two maintenance employees in the unit is applicable to the five-facility unit.

⁶ The record is silent concerning distances between any of the Employer's facilities other than those at Tulare, Lemoore and Farmersville. The distances between the other locations were obtained from Yahoo.com.

geographic proximity of the various facilities; centralized control of management and supervision; and bargaining history. Bashas', 337 NLRB No. 113 (2002); Alamo Rent-A-Car, 330 NLRB 897 (2000), citing, NLRB v. Carson Cable, 795 F.2d 879, 884 (9th Cir. 1986).⁷ In particular, the Board focuses on whether the employees in the petitioned-for unit share some traits or benefits or other factors that are not also shared by the employees in the same job classifications at other nearby employer facilities, including whether they are in a separate administrative grouping of the employer. *Id.* Applying this test to the facts of this case, I conclude that the petitioned-for multi-facility unit is an appropriate unit.

Employee Skills and Duties and Terms and Conditions of Employment

It is undisputed that the skills and duties of employees employed in the same classifications at the five facilities covered by the petition are quite similar, as are their terms and conditions of employment. It is also undisputed that the skills and duties of all of the employees employed by the Employer in the same classifications throughout the area, from Madera to Taft, are essentially the same. Their terms and conditions of employment are also the same, with the exception of those employees employed at the Fresno/Friant facility. The employees at that facility are represented by Petitioner in a single facility bargaining unit. As a result of the collective bargaining agreement governing those employees, some of their terms and conditions of employment differ from those employed at the Employer's other facilities. Further, all un-represented

⁷ The Employer contends that this case should be analyzed in terms of the Board's single plant presumption. However, it is well established that the single plant presumption does not apply where, as here, the petitioner seeks a multi-facility unit. Capitol Coors Co., 309 NLRB 322, f.1 (1992). The cases cited by the Employer in its Request for Review are distinguishable in that in those cases the petitioner sought a single facility unit.

employees at the petitioned-for five facilities, as well as all un-represented employees employed by the Employer at its 23 facilities are subject to the same personnel policies.⁸ Thus, the evidence establishes that the employees employed in the petitioned-for five facility unit share common skill, duties and conditions of employment, but do not share any unique skills, duties or conditions of employment that differentiate them from the rest of the Employer's employees.

Employee Interchange

While there is some evidence of interchange among employees employed at the five petitioned-for facilities, I find that the evidence is insufficient to establish an interchange that is unique among the Employer's facilities in the Employer's central region. Thus, out of the 9 employees in the petitioned-for unit, five rarely, if ever, work anywhere other than at the facility to which they are assigned. In this regard, there is no evidence that the one loader/operator/yardman employed at the Farmersville facility ever works at any of the other two facilities.⁹ The evidence reveals that only occasionally will one of the four batch plant operators employed at the three facilities relieve or help a batch man at one of the other two facilities in the petitioned-for unit. Thus, from the time the Lemoore facility went on line in March 2003 to the date of the hearing, the Lemoore batch plant operator was relieved only once and the relief person was a batch plant operator from the Tulare facility, which employed two

⁸ According to the undisputed testimony of the Employer's witnesses, all of its unrepresented employees are subject to the same benefits, such as health care and pension, but the wages of unrepresented employees employed in the same classification may vary based on experience and/or length of service

⁹ The method of loading materials into the batch plant is different at Farmersville than at Lemoore and Tulare. At Farmersville, the loader/operator/yardman uses a front-end loader to load materials into the batch plant while at Tulare and Lemoore a conveyor belt system is used which does not require a loader/operator/yardman.

batch plant operators at that time. Also, since March 2003 on two occasions employees from the Tulare or Farmersville facilities were brought to the Lemoore facility to help the Lemoore batch plant operator with an unusually large or difficult "pour." However, there is also evidence that the Employer would use batch plant operators from its other facilities, including the facilities in the southern region, in order to fill temporary vacancies in the Tulare, Farmersville or Lemoore facilities. In making such decisions, the Employer states that it considers which facilities have two batch plant operators, and which facilities have a lesser workload.

There is also evidence that batch plant employees and yardmen from the Employer's central region were invited to an informational/training session held by the Employer at the Fresno/Friant facility. The meeting was about the use of certain additives sold by an outside vender, and a vender representative led the meeting. Employees from Lemoore, Farmersville, Madera and Fresno/Friant attended the meeting. There is some evidence indicating that the batch plant operator from Tulare was invited but did not attend the meeting.

The two mechanics assigned to the Tulare facility regularly service the Employees' vehicles at the Tulare, Lemoore and Farmersville facilities, and do not regularly service the vehicles at or from the Employer's other facilities. The Employer's two maintenance employees regularly service the equipment/machinery at the Tulare, Lemoore and Farmersville facilities. However, it is undisputed that these two employees essentially work out of their homes, drive mobile shop trucks and regularly service the plant

equipment/machinery for at least the 10 Employer facilities between Madera and Taft, including those at Tulare, Lemoore and Farmersville.

In sum, there was one training session in which the Employer invited certain of its employees from each of the five central region facilities. Batch operators from some of the petitioned-for facilities have on some limited occasions worked at another of the petitioned-for facilities. The mechanics regularly work at three of the petitioned-for facilities. The maintenance employees are assigned to work at each of the five petitioned-for facilities, but they also work at numerous other Employer facilities. Although this evidence of interchange is not so unique and overwhelming that it establishes, in and of itself, the appropriateness of the petitioned-for unit, it is evidence that supports such a conclusion.

Functional Integration

The five petitioned-for facilities are functionally integrated in that they constitute the Employer's central region with regard to employees. Thus, the batch operators of the three facilities are part of the Employer's five-facility central region for batch plant operators, loader/operator/yard men and ready-mix truck drivers. In this regard, the dispatcher based at the Fresno/Friant plant sends the batch plant operators at all five locations daily directions by way of computer as to what products to mix, when to mix them and for which customers.¹⁰ Moreover, when one of the petitioned-for batch plants has a particularly heavy workload or needs a temporary substitute operator, the

¹⁰ The Fresno/Friant dispatcher also dispatches the truck drivers assigned to the five locations. While the truck drivers are assigned to particular facilities within the central district, they are dispatched to the other facilities when needed.

Employer may send batch operators from any of its batch plants, not merely from one of the other petitioned-for plants. As noted above, the mechanics are typically dispatched to work at the Tulare, Lemoore and Farmersville facilities. Thus, the evidence shows that there is functional integration among the petitioned-for facilities that is distinct from the Employer's other facilities.

Geographic Proximity

The distances between the five facilities in the petitioned-for unit are not sufficiently great to make a multi-facility unit composed of these facilities inappropriate. Each of the facilities is located within about 20-70 miles of each of the other central region facilities. Although the Employer's Delano facility is located about 37-45 miles from the Tulare and Farmersville facilities, the Delano facility is about 60 to 95 miles from the Fresno/Friant and Madera facilities. Thus, the evidence of geographic proximity does not undermine the appropriateness of the petitioned-for unit and does not warrant the inclusion of the Delano facility, which is not a part of the Employer's central region. See Bashas'. Inc., supra.

Centralized Control of Management and Supervision

It is undisputed that the Employer's managerial and supervisory control over the employees in the petitioned-for unit is highly centralized. Thus, the batch plant operators and the loader/operator/yard men in the petitioned-for unit are directly supervised not by someone located at the individual facilities but by central region operations manager Junior Barbosa. The two maintenance employees have the same supervisor, operations manager Ambrosini, who is

also responsible for the direct supervision of all of the Employer's maintenance employees. Similarly, Elio Alves supervises the two mechanics, who primarily service the rolling equipment/machinery at the Lemoore, Tulare and Farmersville facilities. Alves also directly supervises the other mechanics who service the Employer's other facilities in the southern region.¹¹

The record establishes that the batch plant operators, loader/operator/yard men constitute a majority of the employees in the petitioned-for unit. These employees at the five petitioned-for facilities make up the Employer's central region and share a common supervisor. This evidence supports the conclusion that the petitioned-for unit is sufficiently unique from the Employer's other facilities to find it an appropriate unit. Alamo Rent-A-Car, *supra*, at 898. Although the respective supervisors of the two maintenance employees and the two mechanics also supervise employees who are not working at or out of the petitioned-for facilities, the mechanics and maintenance employees in the petitioned-for unit do share common supervisors. Therefore, the fact that the Employer uses a different regional model for the four employees in these two job classifications does not undermine the conclusion that the petitioned-for unit is comprised of all of the applicable employees in an administrative grouping of the Employer's facilities, and that that grouping is sufficiently distinct from the employees located at facilities that are in the Employer's other administrative groupings.

¹¹ The record is silent on the number of mechanics employed by the Employer in the area from Madera south to Taft.

Bargaining History

There is no history of collective bargaining between the Employer and the Union regarding the petitioned-for unit. From about the late 1980s through about 2001, the Union represented a multi-facility bargaining unit, which by 2001 included facilities at Tulare, Lemoore, Farmersville and Lemon Cove. These facilities were then were owned and operated by Artesia Ready Mix.¹² The bargaining unit for these four facilities included all production and maintenance employees, including drivers. Currently, the Union represents a unit of employees at the Employers Fresno/Friant facility.¹³ The Employer has recently recognized Teamsters Local No. 94 as representative of its drivers in single-facility bargaining units at Lemoore, Tulare and Farmersville and has signed single-facility collective bargaining agreements covering the drivers at each of these facilities.¹⁴

The bargaining history here does not establish any kind of consistent pattern and the composition of the recognized units has varied over the years. In these circumstances, I have concluded that the bargaining history is not determinative with regard to the appropriateness of the five-facility unit.

The Employer argues in its Request for Review that the parties contract covering the employees at the Employer's Fresno/Friant facility is a bar to an election in the five-facility unit. The Employer apparently bases this argument on some language in Board cases indicating that a collective bargaining agreement

¹² Lemon Cove is located about 29 miles from Tulare, 15 from Farmersville and 45 from Lemoore. The Employer does not operate a facility in Lemon Cove.

¹³ The record does not reveal when the Employer recognized the Union at this facility; although it was prior to the Employer's acquisition of the three petitioned-for facilities.

¹⁴ Local 94 also represents the Employer's drivers at its Fresno/Friant facility.

between an employer and union serves as a bar against either party. Montgomery Ward & Co., 137 NLRB 346 (1962) involved an RM petition, and General Cable Corp., 139 NLRB 1125 (1962) involved a situation where a union filed an RC petition in order to replace an incumbent union. I therefore conclude that neither of these cases is applicable here.¹⁵

Based on my analysis of the above factors, I find that the petitioned-for five-facility unit now sought by the Petitioner is an appropriate unit. The proposed unit conforms to one of the Employer's administrative groupings and the employees at these facilities share a sufficiently unique community of interest from the Employer's other facilities to constitute an appropriate unit. Alamo Rent-A-Car, supra at 898, and Bashas, Inc., supra.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I make the following findings, which supplement the findings set forth in my initial Decision and Order in this case:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

¹⁵ In Montgomery Ward, the Board notes that it does not want Employers or Unions to use petitions as a means to change or remove the union representing the employees or as a means to escape from their contractual commitments. The Union in this case is not seeking to change unions or to escape the terms of its collective bargaining agreement with the Employer. I note that initially the Union did not seek the inclusion of the Fresno/Friant facility in the unit. Rather, the Union has sought to include the Fresno/Friant facility in the unit only because the Employer opposed the original petitioned-for multi-facility unit and I decided that the smallest appropriate multi-facility unit would be the Employer's five central region facilities. In these circumstances, I have concluded that the Union may seek an election in a broader unit notwithstanding its collective bargaining agreement covering the Fresno/Friant facility.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time batch plant operators, mechanics, maintenance employees and loader/operator/yardmen employed by the Employer at its facilities in Tulare, Lemoore, Farmersville, Merced and Fresno/Friant, California; excluding drivers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by OPERATING ENGINEERS LOCAL UNION NO. 3, INTERNATIONAL UNION OF OPERATING ENGINEERS. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to the issuance of this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be

used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received at the office of Region 32 of the Board, located at the Ronald V. Dellums Federal Building, 1301 Clay Street, Suite 300N, Oakland, CA 94612-5211, on or before **September 19, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (510) 637-3315. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C.

20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **September 26, 2003**. The request may **not** be filed by facsimile.

Dated: September 12, 2003

Alan B. Reichard, Regional Director,
National Labor Relations Board
Region 32

32-1274

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